No._____

Supreme Court, U.S.
FILED
JAN 14 1994
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1993

HOUSE OF RAEFORD, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles P. Roberts, III.*
HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A.
230 North Elm Street
Suite 1650
Greensboro, N.C. 27401
(919) 373-0325

Counsel for Petitioner
*Counsel of Record

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

1. Does Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), proscribe acts which merely provide an employer with the opportunity to engage in coercive conduct when it is conceded that the employer did not, in fact, threaten, coerce, or intimidate employees?

2. Does an employer violate Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), as a result of its supply clerk recording for inventory purposes the names of employees who voluntarily request that they be provided pro-company t-shirts when there is no evidence that any employee was threat-

ened, coerced, or encouraged to request or wear a pro-company t-shirt?

3. Must a supervisor specifically advise employees that she is stating her personal opinion in order for that opinion to be protected by § 8(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(c)?

4. Does an employer violate Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), when a low level supervisor states a personal opinion that she is afraid that she (the supervisor), as well as other employees, might be out of a job if the Union is voted in?

Parties to the Proceeding

The parties before this Court are those set forth in the caption.[1]

---

[1] Petitioner has no parent company or nonwholly owned subsidiary company.

TABLE OF CONTENTS

	Page
Questions Presented.	i
Parties to the Proceeding. .	iii
Table of Contents.	iv
Table of Authorities	vii
Reference to Official and Unofficial Reports of Opinion Below.	2
Statement of Jurisdiction. .	3
Relevant Statutory Provisions	4
Statement of Case.	6
A. Statement of Proceedings Below.	6
B. Relevant Facts . .	13
Reasons For Granting The Writ	17

TABLE OF CONTENTS

Page

A. The Board, With The Approval of The Panel Majority, Has Expanded Section 8(a)(1) To Prohibit The Mere Opportunity, Never Acted Upon, To Engage In Unlawful Conduct . . 19

B. The Board, With The Approval of The Panel Majority, Has Proscribed Pure Statements of Opinion In Violation of Section 8(c) of The Act 33

Conclusion. 38

Appendix

House of Raeford Farms, Inc., v. NLRB, United States court of Appeals for the Fourth Circuit Order dated October 18, 1993 (denying petition for rehearing. 1

House of Raeford Farms, Inc. v. NLRB, United States Court of Appeals for the Fourth Circuit Order dated October 6, 1993 (amending Opinion of Court). 3

TABLE OF CONTENTS

Page

House of Raeford Farms, Inc. v. NLRB, United States Court of Appeals for the Fourth Circuit Opinion dated September 20, 1993 (Opinion of Court) 4

House of Raeford Farms, Inc., 308 NLRB 568 (1992) (opinion of NLRB including opinion of ALJ) 44

TABLE OF AUTHORITIES

Cases — Page

Acute Systems, Ltd., 214 NLRB 879 (1974). 24

Farah Manufacturing Co., 204 NLRB 173 (1973). 24

General Shoe Corp., 77 NLRB 124, (1948), enf'd, 192 F.2d 504, (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952) 28

Han-Dee Pak, Inc., 249 NLRB 725, 730 (1980). 25

Houston Chronicle Publishing Co., 293 NLRB 332 (1989) . 26-30

Livingston Shirt Corp., 107 NLRB 400, 33 LRRM 1156, 1156-1158 (1953) 23

Lott's Electric Co., 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 282 (3rd. Cir. 1989). 26, 31

National Gypsum Co., 280 NLRB 1003 (1986). 26-30

Phillips Industries, Inc., 295 NLRB 717, (1989). . . 24

TABLE OF AUTHORITIES

	Page
Republic Aviation Corp. v. NLRB, 324 U.S. 793, reh'g denied, 325 U.S. 894 (1945).	25
Standard Products Co., 281 NLRB 141 (1986), modified on other grounds, 824 F.2d 291 (4th Cir. 1987). . . .	36-37
Statutory Provisions	
NLRA Section 7, 29 U.S.C. § 157.	4
NLRA Section 8(a)(1), 29 U.S.C. § 158 (a)(1). . . .	4, 8, 9, 10, 11, 12, 13, 18, 19, 20, 22, 26, 27, 29, 32, 37
NLRA Section 8(a)(3), 29 U.S.C. § 158(a)(3). . . .	4, 8, 9
NLRA Section 8(a)(4), 29 U.S.C. § 158 (a)(4) . . .	8, 9

TABLE OF AUTHORITIES

	Page
Statutory Provisions (cont.)	
NLRA Section 8(c), 29 U.S.C. § 158 (c).	5, 18, 19, 22, 28, 33, 34, 35, 38
NLRA Section 9(a), 29 U.S.C. § 159(a).	5
NLRA Sections 10(a) and (b), 29 U.S.C. §§ 160(a) and 160(b)	8
NLRA Section 10(c), 29 U.S.C. § 160(c).	8
NLRA Sections 10(e) and (f), 29 U.S.C. §§ 160(e) and 160(f)	12

No. 93 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

HOUSE OF RAEFORD FARMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The National Labor Relations Board issued its order on August 31, 1992. Said order is reported at 308 NLRB 568 (1992). (A copy is reproduced in the appendix to this petition at page 44). The United States Court of Appeals for the Fourth Circuit issued its decision on September 20, 1993. Said decision was unpublished but carries the case numbers 92-2114 and 92-2216. (A copy is reproduced in the appendix to this petition at page 4). The opinion was amended on October 6, 1993. (A copy is reproduced in the appendix to this petition at page 3). Petitioner's timely petition for rehearing was denied on October

18, 1993. (A copy is reproduced in the appendix to this petition at page 1).

STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on September 20, 1993. A timely petition for rehearing was filed on October 1, 1993. On October 6, 1993, the court of appeals amended its opinion. On October 18, 1993, the court of appeals denied the petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) of National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), provides:

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

Section 8(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(c), provides:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

> the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF CASE

A. Statement of Proceedings Below

On August 15, 1988, the United Food and Commercial Workers Union (Union) filed a representation petition with the National Labor Relations Board (NLRB or Board) requesting that it be designated as the exclusive

bargaining representative for production and maintenance employees employed by House of Raeford Farms, Inc. (Company or Raeford) at its Raeford, North Carolina facility. As a result of this petition, the Board conducted a secret ballot election on October 7, 1988. In this election, employees rejected the Union by a vote of 420 to 391 with 29 challenged ballots. (Appendix -p. 18).

Subsequent to the election, the Union filed objections alleging that the Company had interfered with the election. It also filed unfair labor practice charges against the Company. As a result of these charges and objections, the Regional Director for Region Eleven of the NLRB issued a Consolidated Complaint, as amended,

alleging that the company unlawfully discharged two employees in violation of Section 8(a)(1) of the Act; that it unlawfully discharged seven employees in violation of Sections 8(a)(1) and 8(a)(3) of the Act; that it unlawfully refused to rehire one employee in violation of Section 8(a)(4) of the Act; and that it had committed various independent violations of Section 8(a)(1) of the Act. (Appendix - pp. 83-86).

The NLRB acquired jurisdiction under Sections 10(a) and (b) of the Act, 29 U.S.C. §§ 160(a) and 160(b). Pursuant to Section 10(c) of the Act, 29 U.S.C. § 160(c), a hearing was held before Administrative Law Judge Bruce C. Nasdor (ALJ), beginning on June 20,

1989 and concluding on February 14, 1990.

The ALJ issued his decision on June 12, 1991. He found that the allegations that the Company had engaged in conduct violative of Sections 8(a)(1), (3), and (4) of the Act were not supported by credible evidence and recommended that the Complaint and Objections be dismissed in their entirety. (Appendix - pp. 314-315).

The Board's General Counsel and the Union filed exceptions to the ALJ's Decision on August 13, 1991 and August 14, 1991, respectively. On August 31, 1992, the Board issued its Decision, Order, and Direction of Second Election. With three specific exceptions, the Board adopted the ALJ's decision as its own.

Specifically, the Board deviated from the ALJ's decision on the following issues, finding that:

(1) The Company's solicitation of employee grievances, its promise to remedy those grievances, and its actual grant of new benefits, during the organizational campaign, violated Section 8(a)(1) of the Act. (Appendix - pp. 47-62).

(2) The Company's recording of the names of employees who received "vote-no" t-shirts reasonably tended to interfere with the employee's free choice of a bargaining representative and therefore violated Section 8(a)(1) of

the Act. (Appendix - pp. 62-66).

(3) The Company violated Section 8(a)(1) of the Act, and interfered with employee free choice in the election, by Supervisor Annie Gilchrist's conversations with employees in which she stated that she was afraid that she, as well as other employees, would be out of a job if the employees selected the Union as their bargaining representative. (Appendix - pp. 67-70).

On September 5, 1992, the Company timely filed its petition for review of the Board's decision with the United States Court of Appeals for the

Fourth Circuit. On October 2, 1992, the Board filed a cross application for enforcement of its order. The court of appeals acquired jurisdiction pursuant to Sections 10(e) and 10(f) of the Act, 29 U.S.C. §§ 160(e) and 160(f). Those applicable provisions specify no time in which a party must seek review of a Board order.

On September 20, 1993, the panel of the court of appeals unanimously refused to enforce that part of the Board's decision finding that the Company had violated § 8(a)(1) by soliciting and promising to correct grievances after a mass walkout of employees. (Appendix - pp. 11-20). A majority of the panel, however, enforced the two portions of the Board's order finding that the Company violat-

ed § 8(a)(1) by recording the names of employees who requested pro-company t-shirts and by the statements of a low level supervisor that she was afraid that she, as well as other employees, might be out of a job if the Union was voted in. (Appendix - pp. 20-33). Judge Wilkinson dissented from this portion of the decision and stated that he could find no violations of the Act by the Company. (Appendix - pp. 33-43).

B. Relevant Facts

The Company operates a turkey processing plant in Raeford, North Carolina where it employs approximately 1000 employees. Although numerous allegations of unlawful conduct by the Company during the course of the union

campaign were made, only two remain at this time.

The ALJ's findings of fact regarding the distribution of t-shirts was not reversed by either the Board or the court of appeals. These findings were as follows:

> [Food Service and Deli Sales Manager] Brenda Branch testified that she ordered approximately 1,000 "vote no" tee shirts and gave them to Beatrice McCrae, the supply room clerk to distribute to employees.
>
> McCrae testified that as part of her normal duties she keeps all supplies which are distributed to the employees. She requires them to sign for any of such supplies in order to keep track of the inventory, and at the end of the year she throws away the list.
>
> Therefore, McCrae, as is consistent with her normal procedure, required the employees who asked for teeshirts to sign a list. Management gave her no instruc-

tions to keep such a list. There is no evidence that management was even aware of the list. According to the testimony of McCrae, two employees, Monroe and Ware saw the list because they helped pass out the shirts.

McCrae decided not to give "vote no" tee-shirts to employees who were wearing pro-union tee-shirts. Therefore, several employees were denied shirts. Branch testified she was unaware of this until she received complaints from several employees. Thereupon, she called McCrae and asked why she was not giving tee-shirts to these employees. McCrae responded that she didn't feel that someone who was wearing a union tee-shirt should get a "vote no" shirt. Branch informed Johnson [Company President] of the situation and he agreed with McCrae that the employees had to be one way or the other.

There is no evidence that the list was utilized for polling purposes. The employees with pro-union shirts were literally showing their sentiments on their chest. The list was

> simply for the purpose of keeping track of inventory. No employees were coerced or pressured into wearing the "vote no" shirts. Accordingly, I recommend that this allegation in paragraph 9(s) of the complaint be dismissed.

(Appendix - pp. 300-303).

The ALJ's findings of fact regarding the statements made by supervisor Annie Gilchrist were not reversed by either the Board or the court of appeals. These findings were as follows:

> Gilchrist testified that she had one on one conversations about the Union with approximately eight to ten employees including those named above. She testified further that she said the same thing to each of them. Gilchrist related that she said "I'm not asking you how you plan to vote." She then told the employees "I need my job and if the Union come, we both might be out of a job." When she was asked how long

> these conversations lasted, she testified "it wasn't even a minute, ---." The transcript should be corrected at page 1345 to correct the word "was" to "wasn't." The witness testified using the word "wasn't."
>
> I have no doubt that Gilchrist was expressing her personal opinion. It is also noted that Gilchrist, in her testimony used the word "might," and I credit her. There is no evidence that Gilchrist [sic] remarks were communicated by employees to other employees. The conversation occurred in the work area, not in an office. Moreover, Gilchrist did not represent that she was speaking on behalf of Respondent. I recommend dismissal of the allegation relating to Gilchrist in paragraph 9(j) of the complaint.

(Appendix - pp. 288-289).

REASONS FOR GRANTING THE WRIT

This case presents two important issues of federal labor law which have

not been, but should be, settled by this Court. The decision of the panel majority of the court of appeals, over the dissent of Judge Wilkinson, has sanctioned the Board's unprecedented efforts to expand the scope of Section 8(a)(1) of the Act and limit the scope of Section 8(c) of the Act.

More specifically, the Board, with the approval of the panel majority, has expanded Section 8(a)(1) of the Act to proscribe conduct which is neither threatening, intimidating, nor coercive, but which merely creates an "opportunity", never acted upon, to engage in threatening, intimidating, or coercive conduct.

The panel majority of the court of appeals has also erroneously sanctioned the NLRB's condemnation of pure

statements of opinion which are explicitly protected by § 8(c) of the Act simply because the supervisor did not specifically state that she was giving a personal opinion.

A. The Board, With The Approval of The Panel Majority, Has Expanded Section 8(a)(1) To Prohibit The Mere Opportunity, Never Acted Upon, To Engage In Unlawful Conduct.

Paragraph 9(s) of the Fourth Consolidated Complaint alleged that the Company interfered with, restrained, and coerced its employees in the exercise of their section 7 rights in that it "[p]olled its employees by means of its distribution of "Vote No" T-shirts during September and the first week of October, 1988." The ALJ recommended dismissal of this allegation for the following reasons:

> There is no evidence that the list was utilized for polling purposes. The employees with pro-union shirts were literally showing their sentiments on their chest. The list was simply for the purpose of keeping track of inventory. No employees were coerced or pressured into wearing the "vote no" shirts. Accordingly, I recommend that this allegation in paragraph 9(s) of the Complaint be dismissed.

(Appendix - pp. 302-303).

The Board did not reverse the ALJ's findings of fact. Rather, it concluded that "Respondent's recording of names of those accepting the t-shirts reasonably tended to interfere with the employees' free choice of a collective-bargaining representative, and violated Section 8(a)(1) of the Act" because "[s]uch employer record-keeping of the employee's antiunion sentiments enables the Respondent to

discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts." (Appendix - pp. 64-65).

The court of appeals panel, with Judge Wilkinson dissenting, affirmed this reasoning. According to the majority, "the employer's conduct interferes with an employee's exercise of his or her rights because the recording of the names provides the company with the opportunity to discern the leanings of its employees and to direct its energies toward or to pressure particular employees during a campaign." (Appendix - pp. 23-24).

As far as the Company is aware, this is the first time that the Board or a court has held that an employer commits an unfair labor practice mere-

ly because it had an opportunity to pressure or coerce employees. Such an interpretation of § 8(a)(1) represents an unwarranted expansion of the type of conduct that will violate the Act.

The mere existence of an "opportunity to discern the leanings of its employees and to direct its energies toward or to pressure particular employees during a campaign" (emphasis added) cannot conceivably create an unfair labor practice unless the employer acts on that opportunity by means of threats or promises. An employer has a specific right under § 8(c) of the Act to direct its energies toward persuading employees to support the Company, absent threats or promises. Thus, the Board has stated:

> It is conceded by everyone that Congress in-

> tended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and we find nothing in the statute which even hints at any Congressional intent to restrict an employer in the use of his premises for the purpose of airing his views.

Livingston Shirt Corp., 107 NLRB 400, 33 LRRM 1156, 1157-1158 (1953).

In Livingston Shirt the Board held that it was not an unfair labor practice for an employer to hold captive audience meetings with its employees for the purpose of making speeches and persuading employees to vote against the Union. Given that an employer may lawfully require its employees to sit and listen to the employer's campaign messages, it makes

no sense that an employer commits an unfair labor practice simply because it has the opportunity to direct campaign efforts at employees.

The Board does not contend that it is unlawful for an employer to make available campaign buttons, t-shirts, caps, or other paraphernalia. Indeed, both unions and companies frequently supply such items to their supporters. The Board has long held that such conduct is not unlawful unless accompanied by threats, promises, or pressure to accept or reject the items. E.g., Phillips Industries, Inc., 295 NLRB 717, 233, 133 LRRM 1122 (1989); Acute Systems, Ltd, 214 NLRB 879, 881-883, 88 LRRM 1531 (1974); Farah Manufacturing Co., 204 NLRB 173, 175-176, 83 LRRM 1361 (1973). In fact, the

Board jealously guards the right of employees to wear campaign insignia and an employer may not prohibit the wearing of such insignia absent "special circumstances." Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); Han-Dee Pak, Inc., 249 NLRB 725, 730 (1980).

Neither the Board nor the panel majority suggests that the Company actually used the inventory list to determine where it should direct its campaign efforts, much less that it made any threats or promises. The bottom line is that the Board has penalized Raeford not for its conduct, but for having the opportunity to engage in unlawful conduct. The Board's position in this case exceeds

its authority in determining unfair labor practices and should be reversed.

The only authorities cited by the Board for this overly expansive reading of § 8(a)(1) are the Board's prior decisions in Houston Chronicle Publishing Co., 293 NLRB 332 (1989) and Lott's Electric Co., 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 601 (3rd Cir. 1989). The panel majority also cited National Gypsum Co., 280 NLRB 1003 (1986) as support for its position.

None of these cases support the finding of an unfair labor practice under Section 8 of the Act. First, neither Houston Chronicle nor National Gypsum Co. involved alleged unfair labor practices under Section 8 of the

Act. Rather, these cases were decided solely under the Board's authority under Section 9 of the Act to supervise free and fair elections.

There is a critical distinction between the Board's authority to prohibit unfair labor practices under Sections 8 and 10 of the Act and its authority to regulate representation elections under Section 9 of the Act. In order for conduct to violate the law and constitute an unfair labor practice under Section 8(a)(1), the conduct must "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." Section 7 of the Act guarantees employees the right to organize, to bargain collectively, to engage in concerted activities, and to refrain

from those activities. The Board's authority in adjudicating unfair labor practices is limited by the free speech provision of § 8(c) of the Act.

In supervising elections under Section 9 of the Act, the Board seeks to ensure a free and fair choice of representative. The standard for determining conduct which warrants setting aside an election is not the same as the standard for determining whether an unfair labor practice has been committed. General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948).

In this case, the only final order that is reviewable in the federal courts is the Board's order adjudicating unfair labor practices. Thus, even assuming, arguendo, that Houston Chronicle and National Gypsum are

sustainable under Section 9, they do not support the finding of an unfair labor practice under Section 8 in this case.

Moreover, neither Houston Chronicle nor National Gypsum is remotely similar factually to this case. In both Houston Chronicle and National Gypsum, the employer asked employees to participate in a contest to test their knowledge of the employer's campaign materials. The employees who wished to participate answered questions about the campaign and placed their names or social security numbers on the entry forms. The tests were graded and prizes in excess of $250 were awarded. The Board did not find that these contests were unfair labor practices under Section 8(a)(1), how-

ever, it did find that they constituted objectionable conduct warranting setting aside the elections. In reaching this conclusion, the Board relied both on the size of the prizes and that employees were required to identify themselves on their entry forms.

Unlike Houston Chronicle and National Gypsum, Raeford did not sponsor a contest, did not offer a prize of any type, and did not obtain answers to questions which allowed it to direct pressure at specific employees. The only information that Raeford obtained was the same information that employees were openly displaying by wearing the t-shirts. Houston Chronicle and National Gypsum are completely inapposite.

Although Lott's Electric Co., 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 601 (3rd Cir. 1989), involved unfair labor practices, the facts of the case are totally inapposite. In that case, the employer's supervisor personally handed out "Vote No" buttons to employees. The Board found the action in Lott's unlawful based on the proposition that an employer's request during an election campaign that an employee wear pro-employer insignia constitutes interrogation because it forces the employee into an open declaration either for or against the union. That proposition is inapplicable here. Employees were not approached and asked to either accept or reject a t-shirt. In order to receive a t-shirt, the employee had to

go to the supply room and request one. No supervisor or manager ever coerced or pressured any employee into making such a decision.

In summary the Board's expansive interpretation of § 8(a)(1), which has been sanctioned by the panel majority, is fundamentally at odds with the statute itself, Congressional intent, and well-established case law interpreting the statute. It represents an attempt by the Board to expand its authority under Sections 8 and 10 of the Act to proscribe the mere opportunity to engage in threatening, coercive, or intimidating conduct. The Company requests that the Court grant certiorari in order to review this important issue of federal labor law.

B. The Board, With The Approval of The Panel Majority, Has Proscribed Pure Statements of Opinion In Violation of Section 8(c) of The Act.

The ALJ recommended dismissal of the allegations regarding Supervisor Annie Gilchrist. The ALJ explained:

> I have no doubt that Gilchrist was expressing her personal opinion. It is also noted that Gilchrist, in her testimony used the word "might," and I credit her. There is no evidence that Gilchrist [sic] remarks were communicated by employees to other employees. The conversation occurred in the work area, not in an office. Moreover, Gilchrist did not represent that she was speaking on behalf of Respondent. I recommend dismissal of the allegation relating to Gilchrist in paragraph 9(j) of the complaint.

(Appendix - p. 289).

The Board rejected this recommendation because Gilchrist did not specifically state that she was giving

her personal opinion (Appendix - p. 68). The Board, however, conceded that "a different inference might be drawn had Gilchrist's remarks been made in isolation" rather than in the context of other unfair labor practices (Appendix - p. 69). Over, the dissent of Judge Wilkinson, the panel majority enforced this unfair labor practice.

Section 8(c) of the Act specifically protects the "expressing of any views, argument, or opinion" so long as "such expression contains no threat of reprisal or force or promise of benefit." What the Board, with the approval of the panel majority, has done is engraft on § 8(c) the additional requirement that employees be

specifically advised that an opinion is being given.

There is nothing in the Act that requires an employer's agent to specifically advise employees that she is stating a personal opinion. Rather, the determination of whether a particular statement is a lawful opinion or an unlawful threat is one that must be made on the basis of the total context and circumstances. Here, the ALJ who heard the testimony concluded that Gilchrist's statement was a lawful statement of opinion. The Board's rejection of this recommendation, which is based solely on the fact that Gilchrist did not state that she was giving a personal opinion, is artificial and undercuts the First Amendment protection provided by § 8(c).

Judge Wilkinson, in his dissent, recognized that the failure to use the magic words, "this is my personal opinion" was not controlling:

> [Gilchrist] spoke of her fear that "we both might be out of a job" thereby indicating that she spoke as a fellow employee rather than as a company supervisor. In addition, she made clear that her concern stemmed from her personal need for employment, not from her professional concern for the welfare of the company. In the words of the ALJ, "I have no doubt that Gilchrist was expressing her personal opinion."

The Board's conclusion in this case is contrary to its prior findings in Standard Products Co., 281 NLRB 141 (1986), modified on other grounds, 824 F.2d 291 (4th Cir. 1987). In that case, the Board upheld the administrative law judge's conclusion that statements made by a supervisor in

circumstances strikingly similar to those in the present case did not violate Section 8(a)(1) of the Act. In Standard Products Co., a supervisor told an employee that her

> personal opinion was that she was against the Union, because she was afraid that if the Union came in, the plant would close down, and she needed her job.

281 NLRB at 151.

The only distinction between Standard Products and this case is that Gilchrist did not specifically advise employees that she was stating a personal opinion. As noted earlier, this does not warrant finding an unfair labor practice when it is clear from the surrounding circumstances, as here, that employees understood that a personal opinion was being given.

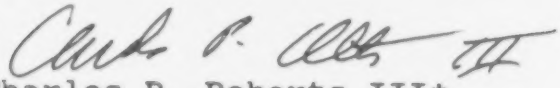
In summary, the Board, with the approval of the panel majority, has substantially reduced the First Amendment right codified in § 8(c) of the Act by requiring that employees be specifically advised that a personal opinion is being stated. The Company requests that this Court grant certiorari in order to review this important issue of federal labor law.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: Greensboro, North Carolina
January ____, 1994

Respectfully submitted,



Charles P. Roberts III*

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
230 North Elm Street, Suite 1650
Greensboro, N.C. 27401
(910) 373-0325

* Counsel of Record

CERTIFICATE OF SERVICE

I, Charles P. Roberts III, do hereby certify that I have this day caused to be filed via Lawyers Printing Co., Inc. with the Clerk's Office of the United States the foregoing Petition For Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit and further certify that copies have been served upon the following person(s), by placing a copy of the same in certified mail, postage prepaid, return receipt requested, properly addressed thereto:

Norton J. Come
Deputy Associate General Counsel
National Labor Relations Board
Supreme Court Branch
1099 14th Street NW
Washington, DC 20570-0001

Aileen A. Armstrong
Associate General Counsel
National Labor Relations Board
Appellate Court Branch
1099 14th Street NW
Washington, DC 20570-0001

Carol Clifford, Esquire
United Food and Commercial Workers,
International Union, AFL-CIO & CLC
1775 K Street, NW
Washington, DC 20006

Dated this the 14th day of January 1994.

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

Charles P. Roberts III

Renaissance Plaza
230 North Elm Street, Suite 1650
Greensboro, North Carolina 27401
(910) 373-0325